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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I

NO IMPORTANT FEDERAL QUESTION IS PRESENTED IN THIS CASE

Petitioner has cited 28 U.S.C. 1257 (3) as the basis for the jurisdiction of this court. However, the granting of a writ of certiorari lies in the sound discretion of the court, and that discretion will not be exercised where the federal question raised is not important, where it is merely "academic or episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 73-74 (1977). Rule 19(1)(a) of the Rules of the Supreme Court provides that for the court to exercise its discretion to grant a writ of certiorari a federal question of substance must be involved. The question presented in this case is simply not important enough to justify

exercise of this court's discretion.

First, it appears that requests by suspects for the presence of persons other than attorneys occur very infrequently. There have been only a handful of reported cases in California involving requests for non-attorneys. Review of the authorities reveals that a minor's request for his parents, and an adult's request for a doctor or psychiatrist, have been held in California to invoke the Fifth Amendment privilege against self-incrimination per se. People v. Burton, 6 Cal.3d 375 (1971); In re Roland K., 82 Cal.App.3d 295 (1978); People v. Parker, 45 Cal.App.3d 24 (1975). But an adult suspect's request for his employer has been held not to invoke the Fifth Amendment. People v. Barrow, 60 Cal.App.3d 984 (1976). No other reported decisions in California have been found which involve a request by a suspect for the presence of a person who is not an attorney.

There appears to be a grand total of three other cases outside of California dealing with requests by minors for parents. All three have ruled that such requests do not per se invoke the Fifth Amendment. Chaney v. Wainwright, 561 F.2d 1129 (CA 5 1977); State v. Young, 220 Kan. 541, 555, 552 P.2d 905, 916 (1976); People v. Riley, 49 Ill. App.3d 304, 464 N.E.2d 306 (1977). Significantly, a petition for writ of certiorari was denied by this court in the latter case. Riley v. Illinois, 98 S.Ct. 1657 (1978). Respondent suggests that the denial of certiorari in Riley was proper because the issue did not qualify as "important." As few cases as there are involving the request by a minor for his parent, respondent has found no other published decision dealing with a minor's request for his probation officer during a custodial interrogation. Certainly petitioner has cited none. Indeed, "expansions" of the Fifth Amendment to requests for persons other than attorneys appears to be virtually nonexistent. This issue is thus clearly "episodic," and much too insignificant to justify the

exercise of this court's discretion to grant the writ of certiorari.

Second, the decision of the California Supreme Court is of extremely narrow impact. That court did not rule that asking for anyone sufficed to invoke the Fifth Amendment, but instead emphasized that requests for "consultation with one's football coach, music teacher or clergyman" do not constitute per se invocations of the Fifth Amendment. In re Michael C., 21 Cal.3d 471, 477 (1978). What remains is a question of the most limited breadth.

Petitioner has disclaimed that the decision of the California Supreme Court was based on any unique status of the probation officer in California law, stressing the court's reliance on Miranda v. Arizona, 384 U.S. 436 (1966). Petition for writ of certiorari, p. 16. This is obviously untrue, or under the court's reasoning a request for consultation with a football coach, music teacher, or clergyman would suffice to invoke the Fifth Amendment. The California Supreme Court expressly disavowed that principle.

The unique role of the probation officer in California is discussed, ante, in II, at pp. 5-7. All the California Supreme Court has held in the instant case is that in light of the statutory and case development of the role of probation officers, a request by a minor in California for his probation officer is the equivalent of asking for an attorney by an adult. The very variety of juvenile justice systems employed by the various states was among the justifications given by this court for rejecting a blanket rule commanding jury trials for all juveniles accused of crime. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). Certainly that reasoning has encouraged the states to devise a variety of probation systems and to experiment with expanding or contracting the role of probation officers toward the wards entrusted to their care and supervision. A state is free either to make a probation officer adverse to a minor or to create a close relationship. No rule as to the role of probation officers in California can have general impact

upon the variety of juvenile probation models which exist throughout this country. Consequently, whatever its importance in California, the decision in this case has very little significance generally and thus does not qualify as an important federal issue.

Third, the very role of the probation officer in this state has changed since Michael C. asked for his probation officer in 1976. Petitioner has included the text of California Welfare and Institutions Code section 650 in that portion of his petition entitled "Statutes Involved." Petition for writ of certiorari, p. 5. The text cited, however, did not come into existence until January 1, 1977. In 1976, when Michael asked for his probation officer, section 650 then provided that probation officers were the petitioning party, actually filing the allegations of misconduct against the minor. In re Michael C., 21 Cal.3d 471, 476 (1978). As amended, section 650 now provides that probation officers file petitions only to seek wardship for incorrigibles pursuant to section 601 of the Welfare and Institutions Code, while the District Attorney is given the exclusive responsibility to file petitions under section 602 of the Welfare and Institutions Code as to minors alleged to have committed acts which would be crimes if committed by adults.

While this change continues the trend toward making the relationship between minor and probation officer closer and not more hostile, any decision in this case adverse to respondent would of necessity be in the context of the former statute; it would not become stare decisis as to the new statute, which creates an even closer relationship. Thus, the importance of this issue is further minimized by the changed nature of the probation officer-juvenile relationship in California as reflected in the changed statute.

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II

THE DECISION BELOW IS NOT REVIEWABLE BY THIS COURT

It is true, as petitioner notes (Petition for writ of certiorari, p. 15), that the California Supreme Court did not expressly rely on the California Constitution as the basis for the reversal of the order. However, as noted above, the court did rely on the unique role of the probation officer in the juvenile law system of the state of California. In re Michael C., 21 Cal.3d 471, 476-477 (1978).

Where the state court decision is based on a state ground independent and adequate to uphold the decision, this court is without jurisdiction to review it. Jankovich v. Toll Road Comm'n, 379 U.S. 487, 489 (1964). Moreover, a state court decision construing state statutory law binds this court to that construction, and where that construction is dispositive of the case no federal issue remains subject to a grant of certiorari. Uphaus v. Wyman, 364 U.S. 388, 389 (1960). In effect, the California Supreme Court has construed the role of the probation officer under California juvenile law here, in holding that a minor's request for his probation officer is equivalent to asking for an attorney. That conclusion constituted merely a construction of a California statutory scheme, which therefore is binding on this court.

The decision of the California Supreme Court also emphasized the unique status of the juvenile ward-probation officer relationship in California. The court held that the "duty to advise and care" for a minor mandated for probation officers in California means that the consultation by a minor with his probation officer acts as a "protective device . . . to dispel the compulsion inherent in custodial surroundings." In re Michael C., supra, 21 Cal.3d at pp. 476-477. The court expressly relied on the special role of the probation officer in California. Id., at p. 476, fn. 1. In

addition, the court cited cases referring to the "close relationship" in California between minors and their probation officers. Bryan v. Superior Court, 7 Cal.3d 575, 587 (1972); In re Gladys R., 1 Cal.3d 855, 860, fn. 7 (1970).

Furthermore, the court noted that Michael feared the police, and wanted and needed the advice of someone he could trust. The court described his probation officer as "a personal advisor who would understand his problems and needs and on whose advice he could rely." In re Michael C., supra, 21 Cal.3d at p. 476. The court concluded that Michael's request for his probation officer was essentially a "call for help," and recognized the role of the probation officer as a "trusted guardian figure who exercises the authority of the state as parens patriae and whose duty it is to implement the protective and rehabilitative powers of the juvenile court." Ibid. The court added that the probation officer " . . . is frequently the person to whom a minor might turn for help on such matters as to whether or not he should obtain an attorney." Ibid.

Thus, the court has held that the relationship between the probation officer and minors in California is a special and unique one controlled by the legislative scheme governing the role of probation officers in California's juvenile justice system. That unique role of the probation officer in California leaves no federal question over which certiorari can be granted.

The failure of the California Supreme Court to discuss the application of the California Constitution to this issue cannot simply be construed as an indication that the court was impliedly holding that California's constitutional guarantee of the right against self-incrimination, found at article I, section 13, clause 5 of the California Constitution, is identical to the federal guarantee under the Fifth Amendment to the United States Constitution. The court did not expressly hold the California Constitution

provision provides no greater protection than its United States constitutional counterpart; accordingly, its failure to discuss that issue should not be viewed as a decision on that point. Indeed, the California Supreme Court frequently in its decisions refers to a provision of the United States Constitution (e.g., "Fourth Amendment") for convenience although it intends to base its ruling on the California Constitution's counterpart guarantee as well. People v. Cook, __ Cal.3d ___, at ___, fn. 4 (Crim. 19804, filed September 8, 1978).

The appropriate method for ascertaining the intent of the California Supreme Court as to the application of the California Constitution would be to remand the matter back to that court for an express declaration as to that question. In California v. Krivda, 409 U.S. 33 (1972), this Court returned the case to the California Supreme Court to determine whether that court relied on the California Constitution or only the federal Constitution, where the court had not so indicated initially. People v. Krivda, 5 Cal.3d 357 (1971). The California court, on remand, relied on the California Constitution. People v. Krivda, 8 Cal.3d 623, 624 (1973). This was also done in Ohio v. Gallagher, 425 U.S. 257 (1975), resulting in the Ohio Supreme Court's statement that it was indeed relying on the Ohio Constitution. State v. Gallagher, 348 N.E.2d 336 (1976). A determination by the California Supreme Court of reliance in part on the California Constitution would preclude the granting of certiorari.

III

THE REVERSAL BELOW CAN BE SUSTAINED ON GROUNDS APART FROM WHETHER THE MINOR'S REQUEST FOR A PROBATION OFFICER CONSTITUTED A REQUEST FOR AN ATTORNEY

The request by the minor for his probation officer was not the only ground urged by respondent as the basis for the

reversal. Respondent pointed to various threats and promises made by the police during the interrogation as an independent basis for reversal. Appellant's Opening Brief, pp. 16-18. Respondent also urged that the minor's repeated invocation of his right to silence rendered the subsequent confession involuntary. Appellant's Opening Brief, pp. 18-19. These grounds were equally meritorious and would have provided ample additional basis to support the California Supreme Court's judgment of reversal.

"A respondent, however, has the right to urge any argument to support the judgment in his favor (save possibly questions of venue, see Peoria R. Co. v. United States, 263 U.S. 528, 536; United States v. American Railway Express Co., 265 U.S. 425, 435-436, and n. 11), even those not passed upon by the court below and also contentions rejected below. Langnes v. Green, 282 U.S. 531, 535-539; Walling v. General Industries Co., 330 U.S. 545, 547 n. 5." Scherk v. Alberto-Culver Co., 417 U.S. 506, at 525 (1974), Douglas J., dissenting.

The California Supreme Court did not reach these additional issues because its reversal was grounded solely upon the minor's request for his probation officer constituting a violation of his privilege against self-incrimination. However, respondent submits that either of these further grounds likewise supports the judgment in his favor and therefore provides a basis for denying certiorari.

Petitioner contends that once the request for the minor's probation officer is disregarded, the confession was voluntary under the "totality of circumstances" test. Petition for writ of certiorari, pp. 14-15. Petitioner relies on the readvisement of rights following the minor's request for his probation officer. However, the record clearly demonstrates the combined use of threats and promises by the authorities in the face of petitioner's repeated invocation of the right to silence.

Michael was told by the police during the interrogation,

"You got a good chance that you can come out of this thing pretty good." ST 15:7-8. He was then told, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled [sic]." ST 15:14-16. These statements are immediately followed by an exchange of words and a "pause." ST 15:17 to 16:23. Michael's conduct during the "pause" was described by defense counsel as "crying" (RT 439:23-26), a characterization in which the trial court acquiesced. RT 440:8-11. Michael then "confessed." ST 16:23 to end. It is unmistakably clear in these circumstances that such promises and threats were being employed by the police to obtain a confession. Such misconduct by the authorities renders the statement involuntary as a matter of law, and regardless of the applicability of Miranda, supra, compels reversal. Lynumn v. Illinois, 372 U.S. 528, 534 (1962).

Moreover, Michael repeatedly invoked his right to remain silent prior to any "confession." Michael was asked almost at the outset if he wanted to tell the officers about the case. He said, "No, I don't know anything about it." ST 3:10-11. When asked about what another minor had said, Michael answered, "I can't do that." When asked why, Michael said, "Because mama said don't tell strangers nothing." ST 12:17-22. Finally, Michael was asked what happened that night, and he said, "Can't." ST 13:25-26. It is therefore plain that on three distinct occasions, Michael told the police he no longer wished to talk with them.

Petitioner is anxious to "insure that the rule adopted in Miranda is confined to the express terms and logic of the original opinion, . . . " Petition for writ of certiorari, p. 12. Yet Miranda itself expressly states that if a suspect indicates in any manner that he wishes to remain silent, any statements obtained thereafter are the product of compulsion and involuntary as a matter of law. Miranda v. Arizona, 384 U.S. 436, 473-474 (1966). Michael

clearly expressed his wish to remain silent. Under Miranda itself, Michael had invoked the Fifth Amendment and his confession is thus inadmissible on grounds independent of the request to see his probation officer.

IV

THE REQUEST BY A MINOR FOR HIS PROBATION OFFICER DOES INVOKE THE FIFTH AMENDMENT

Petitioner is content to note several "exceptions" to Miranda v. Arizona, supra, and to state that no "expansions" of Miranda have been made by this Court. Petition for writ of certiorari, pp. 9-11. Petitioner then argues that in dispelling the inherent coerciveness of in-custody interrogations, the rule of Miranda is limited to requests for counsel; petitioner therefore asserts the California Supreme Court was incorrect in holding that a request for a probation officer invokes the Fifth Amendment. Petition for writ of certiorari, pp. 12-15.

The attempt to limit the class of persons who can dispel the inherent coerciveness of in-custody police interrogations to attorneys is not viable in light of the California Supreme Court's characterization of the unique role of the probation officer in California, discussed above. The duties of the probation officer in California are set forth in California Welfare and Institutions Code section 280, which expressly states that " . . . the probation officer shall . . . represent the interests of each person who is the subject of a petition to declare such person to be a ward. . . ." In view of the mandate upon every California probation officer to represent each potential ward, California law clearly contemplates performance by the probation officer of the same function as counsel, in assisting the minor during in-custody interrogations by police and helping to dispel the coerciveness of that interrogation. See also In re Michael C., 21 Cal.3d 471, 476-477 (1978).

As noted ante (at p. 9), Miranda does more than merely

hold that a request for an attorney precludes the admission of any confession thereafter obtained. Miranda also states that if a suspect during police custodial interrogation indicates in any manner that he wishes to remain silent, any statements thereafter obtained are inadmissible as being involuntary. Miranda v. Arizona, 384 U.S. 436, 473-474 (1966). It is quite clear from the record in this case that Michael's request for his probation officer indicated he no longer wanted to continue the conversation with the police. At the very least, his request for the probation officer indicated that Michael wanted his probation officer present before continuing with the conversation. Moreover, the very exchange quoted by petitioner during the interrogation shows that Michael did not trust the police to bring in an attorney on whom he could rely, when he inquired, "How I know you guys won't pull no police officer in and tell me he's an attorney?" Petition for writ of certiorari, p. 8. Michael asked instead for someone he was certain he could rely on for help, which is, after all, the purpose behind the rule that a request for an attorney bars further questioning.

Adults can reasonably be expected to ask for an attorney. To require the same level of sophistication in a juvenile is to ignore the realities of the differences between adults and juveniles. This Court has consistently held that confessions of juveniles are to be specially scrutinized, over and above the considerations relevant to adult confessions. In re Gault, 387 U.S. 1, 55 (1967); Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 599-600 (1948). It is only sensible that one of the "special" considerations given to a juvenile's confession should be to determine whether a request for his probation officer which precedes the statement must be regarded as a request for the juvenile equivalent of counsel under the circumstances. In fact, any other conclusion would raise juveniles to adult standards instead

of insuring that special factors be considered for minors.

Furthermore, the very exchange quoted in the petition for writ of certiorari, pp. 7-8, reflects Michael's hesitance to willingly cooperate with police interrogation. The minor shows a fear of the police tricking him; he only says he "might" talk to the police; and he disclaims any knowledge of any murder. These facts establish that even under a general voluntariness test, the confession which followed was involuntary and should not have been admitted.

Therefore, under the "express terms and logic" of Miranda, the request for the probation officer by this minor, and the full context of that request, demonstrate that Michael indicated in several different manners his wish to remain silent. This is far from a "radical departure" from Miranda; it is, instead, the logical corollary of Miranda as applied to juveniles.

Petitioner claims that this case will create "confusion" as to what constitutes a proper waiver of constitutional rights by going beyond Miranda (Petition for writ of certiorari, p. 15), and that the per se exclusionary rule of this case will "unreasonably hamper" law enforcement and probation officers in their investigative efforts. Petition for writ of certiorari, p. 13. It is not clear precisely what "confusion" petitioner fears, for in California it is no longer open to doubt that the request of a minor for a parent or his probation officer invokes the Fifth Amendment. As has been emphasized, the California Supreme Court was careful to draw the line between asking for just anyone, and asking for a "trusted guardian figure who exercises the authority of the state as parens patriae." In re Michael C., supra, 21 Cal.3d 471, 476. Petitioner also fails to explain how the per se rule will hamper law enforcement investigation, except insofar as any requirement that the police not coerce statements from suspects "hampers" police investigation. Petitioner's failure to point to

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other instances in which minors have asked for their probation officers, let alone being able to point to any resulting detriment to legitimate law enforcement investigation, belies any claim that this decision will have much impact nationwide.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court deny the petition for writ of certiorari.

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